IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 09-0578

HERMAN GONZALES, FAWN LYONS, KEN LAUDATO, LAWRENCE WALKER, GARY MANSIKKA, GARY GALETTI, GREG WHITING, MARVIN KRONE, RICHARD BLACK, JIM KELLY, CHRIS SOUSLEY, and All Others Similarly Situated,

Plaintiffs and Appellees,

vs.

MONTANA POWER COMPANY; NORTHWESTERN CORPORATION, a Delaware Corporation; NORTHWESTERN CORPORATION, a Delaware Corporation, as a Reorganized Debtor, Subsequent to Its Plan Confirmation, Hereinafter Referred to as NOR; NORTHWESTERN CORPORATION d/b/a NORTHWESTERN ENERGY; PUTNAM AND ASSOCIATES, INC., a Montana Corporation; JOHN DOES II AND III; and JOHN DOES IV THRU XX,

Defendants and Appellants.

DEFENDANT/APPELLANT MONTANA POWER COMPANY'S BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented by the Montana Power Company on this appeal are:

1. Whether the District Court should have excluded Plaintiffs' claims of malice and punitive damages from its order granting Plaintiffs' motion to certify this matter as a class action, and;

2. Whether the District Court's class definition is appropriate.

STATEMENT OF THE CASE

This appeal is made pursuant to Rule 6(3)d, M. R. App. P., from the District Court's order "Granting Certification Of Class Action Except For Fraud" entered in the Second Judicial District Court on October 2, 2009.

FACTS

This case follows a putative class action litigated in the Montana Workers' Compensation Court, and denominated *Gonzales v. MPC, et al* (which is not yet concluded) in which employees of the Montana Power Company sought payment of past due "impairment awards" for workplace injuries. The employees' claims were initially resolved by the adoption of a stipulated settlement agreement and appointment of a settlement master who, after reviewing thousands of workers' compensation claims against the Montana Power Company for a time period of nearly thirty years, determined that impairment ratings and awards were owed to

approximately 117 workers. Because of the delay in payment of these awards, the settlement master also ordered payment of penalties and attorney fees under the textual provisions of the Workers' Compensation Act. The Montana Power Company did not contest the impairment awards, penalties, or fees.

If the 18 count, 241 paragraph complaint of the Plaintiffs can be described "generally," it alleges–against the Montana Power Company–bad faith handling and adjustment of its self-insured workers' compensation claims, and breach of duties relating to information provided to or concealed from injured Montana Power Company workers who were entitled to compensation benefits based on permanent physical impairment.

On November 7, 2008, the Plaintiffs in this case moved the District Court for class certification. At the time, NorthWestern Energy (pre and post bankruptcy) and the Montana Power Company, were represented by the same law firm[1], which filed briefs resisting class certification. A hearing on Plaintiffs' motion was conducted in the District Court on May 4, 2009, and NorthWestern's and MPC's counsel appeared and argued in opposition to the Plaintiffs' motion. Class certification was resisted by all Defendants in part because questions of

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[1] The law firm has since been granted leave to withdraw from the representation of MPC, and the undersigned has been substituted.

fraud, malice, and punitive damages were (and are) unique to each former MPC employee and not subject to class treatment. As well, the Plaintiffs' proposed class definition was resisted because it thought to create "a fail-safe" class.

On October 2, 2009, the District Court entered its order granting Plaintiffs' motion for class certification "except for fraud." The Court analyzed the allegations made in Plaintiffs' Sixth Amended Complaint under the rubric of Rule 23(a) and (b), M. R. Civ. P. As to the fraud claims alleged in Plaintiffs' Complaint and proposed for class treatment, the District Court ruled:

> [T]he Court will grant Plaintiffs' Motion to Certify a Class Action. However, the Court will limit Plaintiffs' Motion to Certify a Class Action in respect to Plaintiffs' allegations concerning fraud. Due to the substantial individual findings that must be made to prove fraud, the Court is not convinced that fraud can be dealt with within a class action. Therefore, the Court will approve the class action. . . except as to the fraud counts.

Order, p. 2.

The court additionally observed:

> While the Court finds that a class action will be the best method to adjudicate this matter, the Court is not convinced that the fraud allegations can be established through a mechanism such as a class action under Montana law. Fraud claims are highly fact intensive. Fraud claims involve among several elements specific findings regarding the actual individual's reliance on a representation which would make the use of a class

> action extremely difficult in that every individual in the action would have to provide proofs.

Order, P. 11.

The court adopted Plaintiffs' proposed class definition. While it excluded Plaintiffs' fraud claims from class treatment because they were "fact intensive" and unique to individual Plaintiffs, the District Court's order *does not mention* Plaintiffs' claims for punitive damages.

STANDARD OF REVIEW

This Court reviews a district court's decision to grant or refuse a motion for class certification for an abuse of discretion. *See, McDonald v. Washington,* 261 Mont. 392, 400, 862 P.2d 1150, 1154 (1993), cited in *Sieglock v. Burlington Northern Santa Fe Railway Company,* 319 Mont. 8, 81 P.3d 495, 496 (2003). While it did not define "abuse of discretion" in the *Sieglock* case, this Court reversed the district court's order denying class certification because the lower court appeared to have failed to adequately consider the "commonality" element of Rule 23. *See,* Rule 23(a)(2), M. R. Civ. P. Thus, this Court may find an abuse of discretion if the lower court does not appear to have thoroughly considered each of the separate issues arising under Rule 23 with reference to each of the allegations of the Plaintiffs' Complaint.

SUMMARY OF ARGUMENT

1. The lower court's order granting class certification properly excludes Plaintiffs' claims of fraud from class treatment, but does not mention their claims for punitive damages. Such claims depend upon highly individualized proof and should not be part of the "class" claims.

2. The lower court's order improperly defines a "fail-safe" class–one that requires a determination on the merits before class membership is established. The class should be re-defined.

ARGUMENT

Punitive Damages Should Be Excluded From Class Litigation

Rule 23(a) M. R. Civ. P., provides, in part, that "one or more members of a class may sue or be sued as representative parties on behalf of all only if. . .(2) there are questions of law or fact common to the class. . . ." The District Court properly recognized, in *denying* class certification for Plaintiffs' fraud allegations, that "highly fact intensive" claims involving several "specific findings" as to the Defendants' conduct and impact on individual Plaintiffs makes "use of a class action extremely difficult." Unfortunately, the District Court did not apply this reasoning to the Plaintiffs' claims for punitive damages and malice.

MCA § 27-1-221 provides that a defendant may be liable for punitive damages where there has been clear and convincing evidence of actual fraud or actual malice. The statute states:

* * *

> (2) A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury *to the plaintiff* and:
>
> (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury *to the plaintiff*; or
>
> (b) deliberately proceeds to act with indifference to the high probability of injury *to the plaintiff*. [Emphasis supplied]

In Montana, claims for punitive damages are subject to an enhanced standard of proof, they are litigated according to a unique and separate procedure upon a finding of malice or fraud, and they are subject to review and limitations that are constitutionally derived and constitutionally sensitive. *See,* MCA §§ 27-1-221(5), (7)(a)(b)(c). *See also, Seltzer v. Morton,* 336 Mont. 225, 154 P.3d 561, 599 (2007), citing: *State Farm Mutual Auto Insurance Company v. Campbell*, 538 U.S. 408, 416 (2003), and *BMW of North America, Inc., v. Gore*, 517 U.S. 559 (1996).

On matters relating to class litigation, this Court has indicated a willingness to consider federal precedent. "Punitive damage" issues often arise in connection with federal civil rights cases which also consider issues of class certification. Federal courts often find, under the federal standard of "reckless indifference to the federally protected rights of the plaintiff," that the inquiries are too fact specific and individualized to be properly subjected to class treatment.

Nelson v. Wal-mart Stores, Inc., 245 FRD 358 (E.D. Arks. 2007) is representative of the federal law on the subject. In that case, the court observed:

> In most cases, punitive damages are an individualized, and not a class wide, remedy. To be eligible to receive punitive damages an individual plaintiff must "establish that the defendant possessed a reckless indifference to the plaintiff's federal rights–a fact-specific inquiry into that plaintiff's circumstances." Furthermore, given the [United States] Supreme Court's repeated insistence that an award of punitive damages be reasonably related to the harm to the individual plaintiff, an award of punitive damages often must include an inquiry into each plaintiff's individual circumstances in order to determine the amount of punitive damages awardable to that plaintiff.

245 FRD at 375.

Here, the Plaintiffs allege "bad faith" handling of workers' compensation claims spanning a time period of three decades. The named Plaintiffs and putative class members worked throughout Montana; their workplace injuries are unique.

The Plaintiffs' claims were handled by different people. There is no apparent similarity–other than delay in the payment of benefits–in the actual damages incurred by any of them.

In *Seltzer v. Morton, supra.,* this Court considered in detail the reasonableness of a punitive damages award in comparison to the amount of actual damages awarded the Plaintiff. It recognized the constitutional significance of the relationship between the two types of damages, adverting to *State Farm Mutual Auto Insurance Company v. Campbell, supra.*, [holding that courts must ensure that punitive damages are reasonable and proper in relation to the amount of harm to the Plaintiff and the general damages recovered], and *BMW of North America, Inc. v. Gore, supra.,* [holding that "the second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the Plaintiff." 517 U.S. at 580]. This Court acknowledged what was then a recent United States Supreme Court case, *Phillip Morris USA v. Williams,* 549 U.S. 346 (2007): "*Williams* holds that, as a matter procedural due process, a State may not 'use a punitive damages award to punish a defendant for injury that it inflicts upon non-parties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to

the litigation.'" *Seltzer,* 1554 P.3d at 605, fn. 25 citing: *Williams* 549 U.S. 346, 353.

"Strangers to the litigation" would accurately describe non-participating class members who, under the lower court's current order, could receive a "share" of punitive damages the amount of which, *a priori,* would have no constitutionally required nexus with any actual harm they may have suffered, or with any malice to which any of them may have been subjected.

Again, the question of whether claims for punitive damages are appropriately litigated in a class action has come up frequently in federal civil rights litigation. *Allison v. Citgo Petroleum Corp.,* 151 F.3d 402 (5th Cir. 1998), apparently the leading case on the issue, recognizes that punitive damages must be based on individualized proof of harm, rather than a finding of general liability to a class based on a pattern of conduct. *Allison*, 151 F.3d at 418.

The class certification order from which this appeal is taken recognizes, appropriately, that the Plaintiffs' fraud claims are not susceptible to class treatment, dependent as they are on individualized proof. However, the order does not consider the Plaintiffs' claims for punitive damages, and thus it appears it was an abuse of discretion to include those claims–essentially by default–in the order certifying a class. For the reasons expressed above, this Court is requested to

remand this matter with instructions to exclude Plaintiffs' claims for fraud, malice, and punitive damages from the class certification order.

The District Court's Class Definition Is Improper

In its class certification order, the District Court defined the class, in part, as follows:

> MCP employees with compensable worker compensation claims, with permanent impairment ratings under an edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment, injured between January 1, 1970, and March 28, 1998, and not paid an impairment award until after December 10, 1997, and that such outlined above employee falls within [the following category]:
>
> (a) sustaining damages because of MPC's improper claims handling and adjusting procedures. . .

See, Order, p. 4.

This definition, on its face, predetermines that each class member has sustained damages "because of MPC's improper claims handling." The effect of such a definition is that any putative class member who fails to establish–in this proceeding–improper claims handling on the part of MPC is thereby excluded from the class and thus not subject to the binding or *res judicata* effect of this case. It is improper to allow Plaintiffs to have it both ways.

It is commonly acknowledged that deciding the merits of a case in order to determine the scope of a class is inappropriate, and that a class definition that rests on the Defendant's ultimate liability cannot be objective, nor can class members–at the time of certification–be presently ascertained. *See, Capitol One Bank v. Rollins,* 106 S.W.3d 286 (Tex. App. 2003), citing: *Intratex Gas Co. v. Beeson,* 22 SW.3d 398, 403-405 (2000).

A number of cases condemning the creation of "fail-safe" or "one-way intervention" class definitions is found in *Ostler v. Level 3 Communications, Inc.,* 2002 W.L. 31040337:

> Where. . .a decision on the merits of a person's claim is needed to determine whether a person is a member of a class, the proposed class action is unmanageable virtually by definition. *See, Noon v. Sailor,* 2000 W.L. 684274, (S.D. Ind. March 14, 2000) (Denying certification of class defined as any arrestee subjected to a strip search under circumstances rendering the search unconstitutional); *Kenro, Inc. v. Fax Dailey, Inc.,* 962 F. Supp. 1162, 1169 (S.D. Ind. 1997) (denying certification where determining class membership would require individualized determination on the merits of each claim); *Indiana State Employee's Association v. Indiana State Highway Commission,* 78 FRD 724,725 (S.D. Ind. 1978) (same); *Dafforn v. Rousseau Associates, Inc.,* 1976–2 Trade Cases ¶ 61,219, 1976 W.L. 1358 (N.D. Ind. 1976) (denying certification of proposed fail-safe class defined as all persons who paid illegally fixed brokerage fees); *See* also, *Adashunas v. Negley,* 626 F.2d 600, 604 (7th Cir. 1980) (affirming denial of class

> certification where class was unmanageable; determining whether any individual child was a member of proposed class would require extensive battery of educational and psychological tests).

Here, because class membership is dependent upon damage to each class member resulting from MPC's "*improper*" claims handling, class membership is determined by a decision on the merits of Plaintiffs' claims. Again, such a definition would deny the Montana Power Company the benefits of *res judicata*, and would make it nearly impossible to ensure proper notice to all class members.

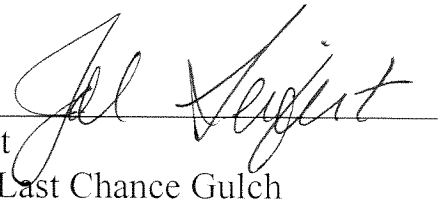
For these reasons, this matter should be remanded with instructions to redefine the class in a way that does not require an initial determination of the merits of Plaintiffs' claims.

CONCLUSION; RELIEF REQUESTED

The Montana Power Company respectfully requests that this matter be remanded with instructions (1) that the Plaintiffs' claims for punitive damages based on fraud or malice be excluded from the Court's order granting class certification, and; (2) that the lower court be directed to redefine the class in such a way as to not require a determination on the merits as a condition for class membership.

DATED this 22nd day of January, 2010.

KELLER, REYNOLDS, DRAKE,
JOHNSON & GILLESPIE, P.C.



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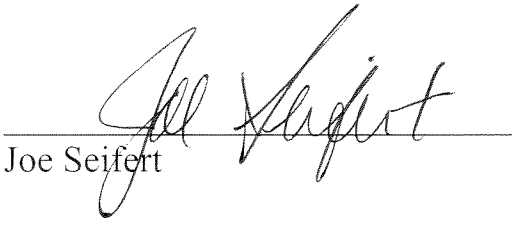
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Answer Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated is not more than 10,000, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 22nd day of January, 2010.



Joe Seifert

CERTIFICATE OF SERVICE

I, Joe Seifert, one of the attorneys for the Defendant, Montana Power Company, above-identified, hereby certify that I served a copy of the within **DEFENDANT/APPELLANT MONTANA POWER COMPANY'S BRIEF**, by depositing the same in the United States mail, at Helena, Montana, postage fully prepaid by first class mail, directed to:

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